

**CITY OF BURLINGTON, VERMONT  
HOUSING BOARD OF REVIEW**

**In re: Request for Hearing of SARAH WELLS and )  
ABBY SETTELMEYER Regarding Withholding of ) Security Deposit Appeal  
Security Deposit by ANDY FRANKENFIELD for )  
Rental Unit at 104 No. Willard Street, Unit 2 )**

**DECISION AND ORDER**

The above-named hearing came before the Housing Board of Review on June 1, 2020; the hearing was held remotely via Zoom. Board Chair Josh O'Hara presided. Board Members Patrick Kearney, Patrick Murphy, Olivia Pena and Betsy McGavisk were also present. Petitioners Sarah Wells and Abby Settelmeyer were present and testified. Respondent Andy Frankenfield was also present and testified.

Upon consideration of the evidence and the applicable law, the Board makes the following Findings of Fact, Conclusions of Law, and Order:

**Findings of Fact**

1. Respondent Andy Frankenfield is the owner of a rental unit, 104 No. Willard Street, Unit 2, in the City of Burlington which is the subject of these proceedings.
2. On or about October 27, 2019, petitioners agreed to rent the property at 104 North Willard Street, Unit 2, under the provisions of a written lease. The term of the lease was June 1, 2020 to May 28, 2021. Petitioners gave respondent a security deposit of \$1,000.00 at that time.
3. On April 10, 2020, petitioners sent respondent an email informing him that they could not commit to renting the apartment because their athletic scholarships were no longer guaranteed due to the pandemic. Petitioner Sarah Wells, who lives in Canada, was not even sure when she would be allowed to return to the United States. Although petitioners still expressed some interest in renting the unit, they understood respondent probably would not want to hold it

for them under the circumstances. Respondent acknowledged receipt of petitioners' email and thanked them for letting him know their circumstances.

4. On April 27, 2020, petitioners emailed respondent again and told him they would not be returning to Vermont for the summer and they were uncertain of their plans for the fall; they told respondent they could not rent the unit. Respondent replied on that same day that he had tenants who would be moving into Unit 2 in the fall and all the apartments in the building were rented beginning in the fall.

5. On May 1, 2020, petitioners requested the return of their security deposit. Respondent replied that he would not be returning the deposit because of the loss of rent. Although the current tenants in Unit 2 decided to stay there, they had planned on renting another apartment owned by respondent which he would then need to rent for the summer. Petitioners again requested the return of their deposit as they believed they kept respondent up-to-date about their circumstances and gave him ample notice so that he could re-rent the unit. Respondent, again, told petitioners he was not returning the deposit because they broke the lease and under the provisions of the lease they forfeited the deposit and were liable to pay all reasonable costs incurred by him, including rent, until a new tenant was found. Although respondent found a tenant for the summer, it was at a reduced rate of rent. Petitioners restated their request for the return of their deposit.

6. None of respondent's emails to petitioners included notice of their right to appeal the withholding of the deposit to this Board. Respondent did not send any other correspondence to petitioners about their deposit.

7. Petitioners never moved into the apartment.

8. Respondent argued that under the lease petitioners forfeited their deposit:

*If Tenant vacates the Premises prior to the expiration of the initial lease term...Tenant shall be liable to pay Owner all reasonable costs incurred by Owner in turning over the unit....and for any rent lost until such time as an appropriate alternative new Tenant is found....*

The lease further provides that if a tenant breaks the lease with or without notice to the Owner, the tenant forfeits half a month's rent as a lease-break fee and the cost will be deducted from the security deposit.

9. Respondent also argued that petitioners were not tenants because they never moved into the unit. Therefore, respondent argued he was not subject to the notification requirements contained in city ordinance with respect to the return of the security deposit.

#### **Conclusions of Law**

10. The City of Burlington's security deposit ordinance, Minimum Housing Code Sec. 18-120, took effect April 10, 1986 and governs any rental arrangements for dwelling units in City of Burlington entered into or renewed after that date.

11. The State of Vermont's Landlord and Tenant Act, now codified at 9 V.S.A. Sec. 4451-68, applies to rental agreements for residential property entered into, extended or renewed on or after July 1, 1986. Its terms are to "be implied in all rental agreements" to which it is applicable. 9 V.S.A. Sec. 4453.

12. Under the city ordinance, as well as state law (the terms of which must be implied in the parties' rental agreement), a landlord must return the security deposit to a tenant within 14 days from the date on which the tenant vacated or abandoned the dwelling unit, with a written statement itemizing any deductions. City ordinance also provides that the written statement must inform the tenant of the opportunity to request a hearing before the Burlington Housing Board of

Review within 30 days of receipt of the landlord's written statement. Minimum Housing Code Sec. 18-120(c). The statement and any payment must be hand-delivered or sent by mail.

Minimum Housing Code Sec. 18-120(c). If a landlord fails to return the deposit with a statement within 14 days, the landlord forfeits the right to withhold any portion of the security deposit. See, Minimum Housing Code Sec. 18-120(c) and 9 V.S.A. Sec. 4461(e).

13. Respondent's argument related to the withholding of the security deposit is two-fold. First, petitioners broke the lease and they forfeited the deposit under its terms. Second, petitioners were not tenants, and therefore, he was not obligated to adhere to the notice requirements in city ordinance. City ordinance states, "[t]enant shall mean a person under a rental agreement to occupy a dwelling unit or rooming unit to the exclusion of others." Minimum Housing Code Sec. 18-2. Similarly, state law states, "[t]enant means a person entitled under a rental agreement to occupy a residential dwelling unit to the exclusion of others." 9 V.S.A. Sec. 4451. Based on these definitions, the Board concludes petitioners were tenants; they had a written lease to occupy the unit to the exclusion of others. In addition, petitioners provided respondent with a security deposit for the unit. Respondent's position is also flawed in that he argues that petitioners broke the lease and are subject to the forfeiture provision of the lease - but if they are not tenants, as he has argued, they are not subject to any of the lease provisions which are between the tenant and the landlord/owner. Contrary to respondent's argument, the Board concludes petitioners were tenants as contemplated by both city ordinance and state law. Therefore, respondent was required to adhere to the notice provisions related to the withholding of petitioners' deposit.

14. A landlord who decides to retain all or part of a security deposit must comply with 3 specific requirements of the ordinance: the deposit must be returned within 14 days of the date

the tenant vacated or abandoned the rental unit with a written statement itemizing any deductions; the statement must contain notice of the tenant's right to appeal to the Housing Board of Review; and the statement must be hand-delivered or sent by certified mail.<sup>1</sup> See *Lieberman v. Circe*, No. S21-13 Cncv (Crawford, J., March 27, 2013) and Minimum Housing Code Sec. 18-120(c). The Vermont Supreme Court required the literal enforcement of these requirements in *In re Soon Kwon*, 189 Vt 598 (2011). Accordingly, a landlord who fails to meet all of these requirements forfeits the security deposit. In this case, respondent failed to comply with the notice requirements by failing to return the deposit with a written statement itemizing any deductions from the deposit within 14 days of the date petitioners informed him they were not moving into the unit and by failing to provide of petitioners' appeal rights in the statement and by failing to return the deposit within 14 days of the vacate date. Therefore, the Board concludes respondent forfeited the right to withhold any part of the deposit.

15. Petitioners are entitled to recover interest on the security deposit. Minimum Housing Code Sec. 18-120(c). The Housing Code requires that the security deposit be held by the owner in an interest-bearing account with an interest rate equivalent to a current Vermont bank passbook savings account. Sec. 18-120(a). The Board applies the interest rate currently found in most bank passbook savings accounts – 0.25% simple annual interest.

### **Order**

Accordingly, it is hereby ORDERED:

16. Petitioners Sarah Wells and Abby Settlemeyer are entitled to recover from respondent Andy Frankenfield the following amounts:

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<sup>1</sup> An amendment to section 18-120(c) removing the "certified mail" requirement took effect on January 7, 2015.

a) \$1,000.00 of the principal amount of the security deposit improperly withheld after May 11, 2020;

b) Interest in the amount of \$1.40 on the entire deposit for the period October 27, 2019 to May 11, 2020; and

c) Additional interest of \$0.007 per day from May 12, 2020 until such date as the amount improperly withheld is returned to petitioners.

DATED at Burlington, Vermont this 30th day of June, 2020.

CITY OF BURLINGTON  
HOUSING BOARD OF REVIEW

/s/ Josh O'Hara  
Josh O'Hara

/s/ Patrick Kearney  
Patrick Kearney

/s/ Olivia Pena  
Olivia Pena

/s/ Betsy McGavisk  
Betsy McGavisk